

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 1315 OF 2004

Bhagchand Genu Gavade

... Appellant
(Ori.Defendant)

V/s

Anand Savaleram Pawale & ors.

... Respondent

Mr. P.N. Karlekar for the appellant.

Mr. G.S. Godbole with Ms. Manjiri Parashis for the respondents.

CORAM: P.V. KAKADE, J.

DATED: 31ST AUGUST, 2005

P.C.:

1. The appellant has preferred this appeal against the judgment and order passed by the Addl. District Judge, Pune, dated 13.4.2004 dismissing the appeal and confirming the judgment and order dated 24.4.2001 passed by the Civil Judge, Jr.Divn., Khed, decreeing the plaintiffs' suit.

2. I have heard the learned counsel for both parties. Perused the record.

3. The plaintiffs filed the suit for specific

performance of the contract against the defendants. He came with the case that the property bearing Gat No.472, area 34 Ares located at Wakalwadi, Tal. Khed, Dist. Pune, was owned and possessed by the plaintiffs. The defendant was the kin relative of the plaintiffs and whenever plaintiffs were in need of financial assistance, they used to demand money from the defendant as the relations were cordial. There was an outstanding of Rs.2,500/- with the plaintiffs and as the plaintiffs were in need of money again in the year 1978, they demanded the same from the defendant. The defendant agreed to give money with a condition to execute sale-deed of the suit property in his favour. Accordingly, the plaintiffs executed the sale deed of the suit property in favour of the defendant on 3.7.1978 with a condition to reconvey the same after taking Rs.500/- from the defendant. It was also agreed that plaintiffs would pay the said amount at the foot of the sale deed of Rs.500/- and already paid the amount of Rs.2,500/- i.e. total consideration of Rs.3,000/- to the defendant, when they arrange for the payment of the said amount and after receiving the said amount, the defendant would reconvey the sale deed of the suit property. Accordingly, on 3.7.1978 defendant executed an agreement to reconvey the sale deed of the suit

property in favour fo the plaintiffs. It is the case of the plaintiffs that the defendant being a close relative, plaintiffs believed that the defendant waited for reconveyance of sale deed of the suit property in their favour, but on each occasion the defendant avoided the same by giving assurances. Again in the last week of May, 1997, plaintiffs demanded the execution of reconveyance but defendant avoided to do the same and thereafter the suit came to be filed. It is the case of the plaintiffs that they were always ready willing to perform their part of the contract.

The defendant contested the suit inter-alia denying all the allegations made by the plaintiffs in this regard. The defendant also came with the case that the suit was barred by limitation and the suit transaction was sale outright and, as such, the suit was sought to be dismissed.

4. The learned Trial Judge adjudicated the dispute on merits on the basis of available evidence and came with the case that the plaintiffs had proved execution of the reconveyance of the sale deed of the suit property and further held that plaintiffs were always ready and willing to perform their part of the contract. On the

other hand, defendant's contentions were discarded and suit came to be decreed.

The appeal was carried to the District Court, Pune. The learned Addl. District Judge, after hearing both parties, concluded that the findings recorded by the lower Court were legal and proper and dismissed the appeal. Hence the present appeal.

5. At the outset, it may be noted that there is no substantial question of law involved in this appeal. Both the Courts below are seen to have properly appreciated the factual aspects of the evidence and have come to the conclusions which are seen to be legal and proper.

The learned counsel for the appellant submitted that the suit transaction was executed in the year 1978, whereas the performance of the agreement was in the year 1997 and, as such, the suit was barred by law of limitation. In support of his contention, the learned counsel for the appellant sought to put reliance on the provisions of Sec.46 of the Indian Contract Act which stipulates,

"Where, by the contract, a promisor is to

perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time."

On the basis of this statutory provision, it was submitted that the period from 1978 to 1997 was definitely not reasonable period contemplated under Sec.46 and, therefore, it must be held that the decree for specific performance cannot be granted by the Courts below. However, in this regard it must be noted that the Explanation to Sec.46 stipulates that,

"The question "What is a reasonable time" is, in each particular case, a question of fact."

Therefore, it is obvious that there is no statutory bar of limitation even if the specific performance of contract is sought for after about 18 years and Court has to see whether such period was a reasonable time in the light of the facts and circumstances of the case. On critical perusal of judgments of both the Courts below, it is apparent that the evidence on record led by the plaintiffs was sufficient to show that the explanation for the delay given by the plaintiffs was

definitely acceptable in order to held that under the circumstances it cannot be said that the plea for specific performance was unduly delayed. It is again, in my view, is a question of fact which is properly appreciated by both the Courts below and, therefore, it need not be interfered with by this Court. The learned counsel for the appellant also sought to put reliance on the provision of Sec.3 of the Limitation Act in order to buttress his submission to the effect that, by virtue of Sec.3 of the Act, the suit was barred by law of limitation. However, it is needless to mention that Sec.3 is applicable only to statutory bar of limitation and cannot be made applicable to the present case. The learned counsel for the appellant, however, sought to put reliance on the provision of Sec.10 of the Transfer of Property Act. However, perusal of the said provision as well as the commentary to which my attention was invited on the said question would definitely show that the said provision is not applicable to the present set of facts, because the provision deals with absolute restraintment on the transfer which is not the case in the present dispute and, therefore, I hold that there is no bar of Sec.10 of the Transfer of Property Act in this case.

6. In this regard, it must be noted that the Apex Court in **Kondiba Dagadu Kadam v/s Savitribai Sopan Gujar & ors.**, reported in 1999 SC 2213, has categorically observed that, it is not within the domain of the High Court to investigate the grounds on which the findings were arrived at by the last Court of fact, being the first appellate Court. It is true that the lower appellate Court should not ordinarily reject witnesses accepted by the Trial Court in respect of credibility but even where it has rejected the witnesses accepted by the Trial Court, the same is no ground for interference in second appeal when it is found that the appellate Court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate Court is binding on the High Court in second appeal. Adopting any other approach is not permissible. In the present case before us, this ratio becomes very relevant especially when both the Courts below have recorded concurrent findings on the basis of available evidence to the effect that the delay of 18 years was properly explained and, therefore, by virtue of Explanation to Sec.46 of the Indian Contract Act, the impugned contract would not be rendered illegal and, as such, I accept the findings recorded by both the Courts

below.

7. The learned counsel for the appellant further submitted that the proceeding involved one registered document of sale deed of the year 1978 and unregistered document of agreement of the same date and on that basis it was submitted that when the registered document was in vogue, unregistered document cannot be taken into consideration. In this respect, it must be noted that this question was neither raised at the trial stage nor at the appellate stage and is being raised during the course of the argument for the first time today. In this regard, the Apex Court in the case of **Kondiba Dagadu Kadam (Supra)**, has observed that,

"Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in second appeal.

This is what has happened regarding the submission made by the learned counsel for the appellant. When the so-called question of law regarding comparison of registered as well as unregistered document is concerned, it was not raised in both the Courts below and, therefore, cannot be held to be the substantial question of law at this stage of

admission of second appeal and hence it cannot be considered at all.

In the result, the appeal stands dismissed with no order as to costs. Consequently, Civil Application No. 1290 of 2004 also stands dismissed with no order as to costs.

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